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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

TERI KENDRICK, in her official capacity as the designated City Prosecutor of the City of Indianapolis, JACK L. COTTEY, Sheriff, BART PETERSON, Mayor, JERRY L. BARKER, Chief of Police,
Petitioners,

v.

AMERICAN AMUSEMENT MACHINE ASSOCIATION, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents ignore what this case is about. The Seventh Circuit created a new and seemingly limitless constitutional right for children to play ultra-violent video games in public places without their parents' consent. According to the Seventh Circuit, this right, which all minors now possess, trumps the long-recognized interests of parents and the government to protect children from indecent or harmful materials. The government can overcome a child's right to play ultra-violent video games, so says the court below, only by providing historic proof that the regulated video games have already caused minors to commit violent acts–a standard that is uncalled for by precedent, unobtainable and unwise.

Right now, the Seventh Circuit's decision is chilling governments across the county from enacting modest measures, akin to Indianapolis's Ordinance, to aid parents in shielding their children from harmful influences. And notwithstanding respondents' blind denials, voluminous scientific research establishes an undeniable correlation between children's exposure to violent video games and children's violent or anti-social behavior, as detailed in the Brief Amicus Curiae of the National Institute on Media and the Family. Ultra-violent video games irrefutably pose a risk to children and communities everywhere, and the Seventh Circuit's decision stifles governments' efforts to address this problem in the most measured manner: requiring parental consent. This Court should grant immediate review to correct the Seventh Circuit's troubling decision and to end the chilling effect it is causing.

1. Respondents fail even to acknowledge the Seventh Circuit's finding that children have a constitutional right to play ultra-violent video games without their parents' consent. Thus, respondents make no effort to square the lower court's holding with this Court's jurisprudence that has consistently found children's first amendment rights are far more limited than those

of adults. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 634 (1979). Respondents have nothing to say about this Court's cases that have often recognized the government's compelling interest in shielding minors from indecent or harmful materials. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997). By their silence, respondents pretend that the source and scope of this newfound right of children is not an issue in this case. Respondents are wrong.

Nor do respondents make any effort to defend the indefensible logic of the Seventh Circuit's decision on this point. Citing no case law to support this leg of its theory, the Seventh Circuit asserts that the basis for a child's right to play ultra-violent games without his parents' consent is simply "obvious." Pet. App. 8a.

> Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either.

Pet. App. 8a (emphasis in original). The Seventh Circuit does not explain how a seven-year-old boy's playing of coin-operated ultra-violent video games in public without his parents' consent will assist him in any way to exercise the franchise years later. More importantly, this logic calls into question myriad governmental restrictions on children's activities, such as curfew provisions or prohibitions on casino gambling, smoking, entering pool halls or bars, or buying lottery tickets. These activities have at least as much connection to the exercise of the

franchise as does a child's playing of violent video games in public. Unless corrected now by this Court, other courts may be misled by the Seventh Circuit's decision and strike down long-accepted regulations on children's activities.

2. Respondents' suggestion that the issues presented here are already settled by this Court and the lower courts is without merit. First, respondents incorrectly argue that this Court's first amendment jurisprudence demands that the Ordinance be subject to strict scrutiny. Br. in Opp. at 22. Respondents fa to come to grips with the fact that the Ordinance applies only to children and does not limit adult access to protected speech. That fact separates the Ordinance from the restrictions at issue in every case respondents cite where the Court applied strict scrutiny.[1] *Ginsberg v. New York*, 390 U.S. 629 (1968), is this Court's lone decision involving a governmental regulation on children's access to indecent or harmful speech where the regulation left adult access unaffected; and *Ginsberg* most assuredly did not apply strict scrutiny. *See id.* at 641. Respondents assume that *Ginsberg*'s principles rest on the special nature of sexual material, and not the special nature of children. This Court's teachings show otherwise. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-55 (1995); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).[2]

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[1] *See* Br. in Opp. at 22-23, citing *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Turner Broad. v. FCC*, 512 U.S. 622 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991); and *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

[2] Respondents inaccurately assert that Section 831-7 of the Ordinance, which prohibits harmful games on government property, is an unconstitutional limitation on adult access to protected speech. Br. in Opp. at 5. Section 831-7, however, has nothing to do with this appeal. As the district court found, respondents waived any such claim. Pet. App. 98a-100a.

Nor do respondents dispel the disagreement among the circuit courts regarding the standard to be applied to first amendment restrictions on children only. Respondents assert that *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998), applied intermediate scrutiny (and not strict scrutiny) because the case involved a content-neutral time, place, and manner restriction on children's speech. But nothing in *Schleifer* suggests that is true. Rather, the curfew regulation in *Schleifer* contained numerous exceptions based on the content of children's activities. 159 F.3d at 852-53 (detailing eight exceptions, including for first amendment activity). *Schleifer*'s analysis is flatly inconsistent with the Seventh Circuit's here.

Equally wrong is respondents' claim that the Court has conclusively held under *Ginsberg*'s variable obscenity doctrine that the definition of obscenity for minors is strictly limited to sexual material and cannot include violence. That question was not before this Court in any of the cases respondents cite. Contrary to respondents' assertion, *Ginsberg* did not address whether the government may regulate children's access to ultra-violent material that is otherwise protected for adults. *Ginsberg* involved only sexual material, not violence. *See Ginsberg*, 390 U.S. at 634. Nor did the Court address that issue in *Roth v. United States*, 354 U.S. 476, 487 (1957), *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), *Cohen v. California*, 403 U.S. 15, 20 (1971), or *Miller v. California*, 413 U.S. 15, 24 (1972); those cases involved the definition of obscenity for adults, not for children. And *Winters v. New York*, 333 U.S. 507, 510 (1948), involved a regulation of violent material that applied to children and adults alike. This Court simply has not had occasion to address whether ultra-violent material may be regulated for minors, so long as adult access is unburdened. "It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad

language in cases where the issue was not presented or even envisioned." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992).

3. Finally, the need for this Court's review of the important and recurring legal issues in this case is not diminished by its procedural posture. The Court's "cases make clear that there is no absolute bar to review" of interlocutory appeals. *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997). The procedural posture is certainly no bar to review here, because the Seventh Circuit effectively treated the issues as purely legal, and its novel opinion as a practical matter ends this litigation. Given the insurmountable hurdle the court below erected for the City to establish a compelling interest, there is nothing left for the district court to decide.

According to the Seventh Circuit, for the government's interests to outweigh a child's first amendment right to play ultra-violent video games in public without his parent's consent, the government must prove that the regulated games actually *caused* children to commit violent acts. Social science research, however, rarely proves *causation*. Rather, as explained by Amicus Curiae National Institute on Media and the Family, social science typically establishes correlation. And here there is abundant evidence demonstrating a correlation between children's exposure to violent video games and children's violent and anti-social behavior. Amicus Curiae details this evidence, so we will not repeat it here. *See* Br. Amicus Curiae at 9-15.

Moreover, the government may be properly concerned about more than just the risk of physically violent behavior posed by children's exposure to regulated video games. Social science research also shows a correlation between playing violent video games and other negative behavior, such as increased likelihood of damaging property, using drugs and alcohol, and engaging

in various forms of anti-social conduct. *See* Br. Amicus Curiae at 12-13. This Court has long "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). But if the Seventh Circuit's strong-arm version of strict scrutiny stands, no government could enact legislation protecting the well-being of minors. The Seventh Circuit's standard is insurmountable.

Nor should this Court delay review of the issues here in order to allow additional percolation below. Because of the very real risks to children and communities posed by children's exposure to ultra-violent video games, additional percolation will cause irreparable harm. And that harm will be exacerbated by the Seventh Circuit decision's chilling effect on other governments nationally. Thus, this Court should grant review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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